

Decision 02-08-061 August 22, 2002

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Southern California Edison  
Company (U 338-E) for Approval of New Rates  
To Be Implemented At The End Of The Rate  
Freeze Period And Other Requested Relief.

Application 00-01-009  
(Filed January 7, 2000)

**OPINION ON REQUEST FOR INTERVENOR COMPENSATION**

This decision awards The Utility Reform Network (TURN) \$17,521.28 in compensation for its contribution to Decision (D.) 02-01-031.

**1. Background**

In this decision, the Commission dismissed without prejudice the application of Southern California Edison Company (Edison) seeking approval of various revenue allocation and rate design proposals that would have become effective with the end of the statutory rate freeze. Following the time that Edison filed its application in January 2000, significant energy events occurred that changed the appropriate rates for the post rate-freeze period. These events included substantial increases in wholesale energy costs, procurement of energy by the California Department of Water Resources (DWR), and eventual implementation of conservation-oriented electric rate design principles in D.01-05-064.

On June 4, 2001 the assigned Administrative Law Judge (ALJ) issued a ruling asking for recommendations for disposition of the application. Edison filed a proposal to either withdraw the application, or in the alternative, that the application be dismissed without prejudice. Edison argued that the ratemaking

issues in its application had been addressed or were being addressed in other proceedings, and thus, it would not be appropriate to implement additional rate design changes in the near term. Edison proposed that rate design should be considered as a second phase of a test year 2003 general rate case filing. TURN recommended adoption of Edison's proposal for dismissal without prejudice, and requested that the Commission articulate the reasons for the dismissal and provide an opportunity for TURN to file an intervenor compensation request.

In D.02-01-031, adopted January 9, 2002, the Commission dismissed the application without prejudice, expressed that these rate design issues have already been addressed, or are being addressed in other proceedings, and concluded that there is no need to litigate rate design methodologies in this proceeding. D.02-01-031 also protected the rights of eligible parties to request intervenor compensation.

## **2. Procedural Matters**

No protests to TURN's request for compensation have been received.

Pursuant to Rule 77.7(f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

## **3. Requirements for Awards of Compensation**

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code Sections 1801-1812. (Unless otherwise noted, all statutory citations are to the Pub. Util. Code.) Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference (PHC) or by a date established by the Commission. The NOI must present

information regarding the nature and extent of the customer's<sup>1</sup> planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. TURN timely filed its request for an award of compensation on March 11, 2002. Under Section 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the Commission, the customer's presentation has substantially assisted the Commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

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<sup>1</sup> To be eligible for compensation, an intervenor must be a customer as defined by Section 1802(b). In D.98-04-059 (footnote 14) we affirmed our previously articulated interpretation that compensation be proffered only to customers whose participation arises directly from their interests as customers. (See D.88-12-034, D.92-04-051, and D.96-09-040.)

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with Section 1806.

#### **4. NOI to Claim Compensation**

TURN timely filed its NOI after the first PHC and was found to be eligible for compensation in this proceeding by a ruling dated June 19, 2000. The same ruling found that TURN had demonstrated significant financial hardship.

#### **5. Substantial Contribution to Resolution of Issues**

A party may make a substantial contribution to a decision in one of several ways.<sup>2</sup> It may offer a factual or legal contention upon which the Commission relied in making a decision,<sup>3</sup> or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted.<sup>4</sup> A substantial contribution includes evidence or argument that supports part of the decision

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<sup>2</sup> Section 1802(h).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

even if the Commission does not adopt a party's position in total.<sup>5</sup>

In D.02-01-031 the Commission dismissed Edison's application without prejudice after finding that "[c]ircumstances and assumptions underlying this application have changed since Edison filed it in January 2000," and that "[t]here is no need to proceed with this application at this time." (D.02-01-031, Findings of Fact, p. 4.) Earlier, in response to Edison's proposal that it withdraw the application or, in the alternative, that the application be dismissed without prejudice, TURN had recommended the latter of the two Edison-proposed alternatives. Thus, D.02-01-031 adopted TURN's procedural recommendation, and on this basis alone TURN contributed substantially to our decision to dismiss the application.

Notwithstanding this simple procedural contribution, TURN submits that we should also consider its request more broadly:

Where, as here, an intervenor eligible for compensation acted reasonably throughout its participation in a Commission proceeding, and the unusual outcome of that proceeding was determined by extenuating circumstances having nothing to do with the proceeding, the Commission should award the intervenor compensation for its reasonable advocate's fees,

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<sup>5</sup> The Commission has provided compensation even when the position advanced by the intervenor is rejected. D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved). (See also, D.89-09-103, order modifying D.89-03-063.) (In certain exceptional circumstances, the Commission may find that a party has made a substantial contribution in the absence of the adoption of any of its recommendations. Such a liberalized standard should be utilized only in cases where a strong public policy exists to encourage intervenor participation because of factors not present in the usual Commission proceeding. These factors must include 1) an extraordinarily complex proceeding, and 2) a case of unusual importance. Additionally, the Commission may consider the presence of a proposed settlement.)

reasonable expert witness fees, and other reasonable cost of participation. (TURN Request, p. 4.)

D.02-01-031 does not discuss or resolve the substantive issues that TURN addressed in the proceeding. In fact, the decision was issued before any intervenor had an opportunity to address the substantive issues in this proceeding through testimony or briefs. It cannot be asserted that TURN's work on substantive issues substantially assisted the Commission in making its procedural decision. TURN appears to acknowledge this, but it goes on to note that the Commission has broad discretion under Section 1802(h) to determine whether an intervenor has substantially assisted the Commission in making its order or decision. TURN also points to the legislative intent, expressed in Section 1801.3(b), that the Commission should administer the intervenor compensation program so as to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process. TURN believes that the Commission should exercise this discretion and fulfill the legislative intent by finding that a substantial contribution has been made.

In lieu of the typical review, TURN suggests that we weigh several factors in considering whether a substantial contribution has been made:

- The circumstances that led to the proceeding's conclusion;
- The appropriateness of the intervenors' participation in the underlying proceeding;
- The reasonableness of the intervenor's participation in the underlying proceeding; and
- Where available, the intervenor's past record of demonstrating a substantial contribution to Commission decisions on similar subjects.

TURN's suggested review criteria have not been given a full airing, and we hesitate to adopt them as appropriate tests of substantial contribution in all

proceedings before us. Nevertheless, we find it appropriate to apply them here. The circumstances that led to our dismissing Edison's application are largely associated with the California electricity crisis that began in 2000. Those circumstances could not have been foreseen or affected by TURN or any other party at the time that TURN commenced its participation in this proceeding. Until it was reasonably certain that processing of Edison's application would be discontinued, it was reasonable and appropriate for an intervenor such as TURN, having a long-established track record of effective participation in revenue allocation and rate design proceedings such as this, to commit resources and engage consultants to review the application, participate in the prehearing conference, conduct discovery, and begin preparation of testimony, all with a reasonable expectation that successful participation would eventually entitle it to receive an award of compensation.

Denying TURN any compensation in this proceeding simply because circumstances beyond its control led to dismissal of the application would be both unfair and inconsistent with the intent of the intervenor compensation statutes. Moreover, doing so could potentially discourage it from participating in future proceedings. We value the continued participation of intervenors like TURN as evidenced by our frequent decisions awarding it compensation for its assistance to our decisionmaking process. Finally, if we were to deny compensation here because there was no decision or order addressing the merits of TURN's substantive participation, we could create an inappropriate incentive for intervenors to argue for the continued processing of cases even where discontinuation of the proceeding is the better outcome.

The intervenor compensation program is not structured to provide an intervenor with full assurance of being reimbursed for its costs of participation. Each time an intervenor such as TURN decides to participate in a given

proceeding, it assumes the risk that its costs of participation therein will not be fully reimbursed. That risk is a part of the intervenor compensation program and is appropriate to ensure that the intervenor's conduct is calculated to assist the Commission in carrying out its public duties. We see no reason to increase the intervenor's risk by denying any compensation in a proceeding that is prematurely terminated for reasons that are not reasonably foreseen and are beyond its control. Based on the fact that TURN's procedural recommendation to dismiss this application was adopted, and taking into account the circumstances that led to the dismissal, we find that TURN made a substantial contribution to the Commission's decision in this proceeding.

## 6. The Reasonableness of Requested Compensation

TURN request compensation in the amount of \$17,701.28 as follows:

### Attorney Fees

Robert Finkelstein	20.75 hours @ \$ 280/ hour	= \$5,810.00
	8.25 hours @ \$ 140/ hour	= 1,155.00
Matthew Freedman	18.0 hours @ \$ 190/ hour	= 3,420.00

### Expert Witness Costs

William Marcus	32.18 hours @ \$ 150/ hour	= 4,827.00
Jeff Nahigian	17.5 hours @ \$ 95/ hour	= <u>1,662.50</u>
	Subtotal:	\$16,874.50

### Other Reasonable Costs

Photocopying expense	= 596.25
Postage costs	97.55
Facsimile/Phone	1.78
Expert Witness expenses	131.20
	Subtotal: <u>826.78</u>
	Total: \$17,701.28



### **6.1 Overall Benefits of Participation**

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was “productive,” as that term is used in Section 1801.3, where the Legislature gave the Commission guidance on program administration. (See D.98-04-059, *mimeo.*, at 31-33, and Finding of Fact 42). In that decision, we discuss the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

Although Edison’s application was dismissed, the possibility of dismissal was not apparent until the ALJ ruling of June 4, 2001, approximately six months after the application was filed. Prior to the ALJ ruling, TURN prepared for participation in the proceeding anticipating that its work would be productive. TURN states, however, that it is not possible to demonstrate productivity by assigning a dollar value to the benefits of participation as there was no Commission decision on the underlying merits of the application, or addressing any matter of dispute. Therefore, TURN submits that we should find that the productivity requirement does not apply in this instance.

We agree with TURN that dismissal of Edison’s application resulted in no issues or benefits upon which to apply the productivity standard and therefore, in this instance, we will not apply the productivity requirement to TURN’s compensation request. As we discussed relative to TURN’s substantial contribution to resolution of issues, TURN reasonably expected to participate in revenue allocation and rate design issues, and to engage consultants and commit resources in its participation. Therefore, we provide an award in order to be

consistent with the purpose of the intervenor compensation statutes, to avoid discouraging potential intervenors, and in order not to create an inappropriate incentive for intervenors to prolong proceedings.

### **6.2 Hours Claimed**

TURN documented its claimed hours through daily records of the time spent by attorneys and its expert witness consultants as provided in its March 11 compensation request. The records indicate both the hours and the activities associated with the hours in this shortened proceeding. We note that these hours were primarily for work prior to the ALJ's June 4 ruling leading to dismissal of the application. Thus, the expenditure of hours is consistent with TURN's expected participation in the proceeding.

We have reviewed the hours and activity records submitted by TURN and conclude that the records reasonably support the claimed hours.

### **6.3 Hourly Rates**

TURN requests hourly rate for its attorneys of \$280 per hour for Finkelstein, and \$190 per hour for Freedman for work done in 2000. In our most recent decision on intervenor compensation for TURN, D.02-06-070, we awarded Finkelstein \$280 per hour and Freedman \$180 per hour for work in 2000. We will adopt these rates for this compensation award.

TURN states that the hourly rate of \$150 per hour for Mr. Marcus, a JBS expert witness, was approved by the Commission in D.00-05-006. Similarly, the hourly rate of \$95 per hour for Mr. Nahigian, a JBS consultant, was approved in D.00-05-017. We find TURN's requested hourly rates for its consultants to be reasonable and consistent with our past treatment of expert witness fees for comparable work.

#### **6.4 Other Costs**

TURN requests \$826.78 for other costs including photocopying and postage, and the travel expenses for its JBS consultants. These costs have been itemized by date, amount and activity. Based on the scope of TURN's work, the documents needed, the activities of its consultants and the size of the service list (73), these costs appear reasonable.

#### **7. Award**

We award TURN \$17,521.28. Our calculation is based on the hourly rates described above plus the other costs.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing May 25, 2002 (the 75th day after TURN filed its compensation request) and continuing until the utility makes its full payment of award.

As in all intervenor compensation decisions, we put TURN on notice that the Commission Staff may audit TURN's records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

#### **Findings of Fact**

1. TURN has made a timely request for compensation for its contribution to D.02-01-031.
2. TURN has made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be extremely small compared to the costs of participating in this proceeding.

3. TURN has requested hourly rates for attorneys, as modified above, and experts that are no greater than the market rates for individuals with comparable training and experience.

4. The other costs incurred by TURN are reasonable.

**Conclusions of Law**

1. TURN has fulfilled the requirements of Sections 1801-1812 which govern awards of intervenor compensation.

2. TURN should be awarded \$17,521.28 for its contribution to D.02-01-031.

3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that TURN may be compensated without unnecessary delay.

**O R D E R**

**IT IS ORDERED** that:

1. The Utility Reform Network (TURN) is awarded \$17,521.28 in compensation for its substantial contribution to Decision 02-01-031.

2. Southern California Edison Company (Edison) shall pay TURN \$17,521.28 within 30 days of the effective date of this order. Edison shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, with interest, beginning May 25, 2002 and continuing until full payment is made.

3. The comment period for today's decision is waived.

4. This proceeding is closed.

This order is effective today.

Dated August 22, 2002, at San Francisco, California.

LORETTA M. LYNCH  
President

HENRY M. DUQUE

CARL W. WOOD

GEOFFREY F. BROWN

MICHAEL R. PEEVEY

Commissioners

## Compensation Decision Summary Information

<b>Compensation Decision(s):</b>	D.02-08-061
<b>Contribution Decision(s):</b>	D.02-01-031
<b>Proceeding(s):</b>	A.00-01-009
<b>Author:</b>	DeBerry
<b>Payer(s):</b>	Southern California Edison Co.

## Intervenor Information

<b>Intervenor</b>	<b>Claim Date</b>	<b>Amount Requested</b>	<b>Amount Awarded</b>	<b>Reason Disallowance</b>
The Utility Reform Network	3/11/2002	\$17,701.28	\$17,521.28	Reduced Attorney Rate

## Witness Information

<b>First Name</b>	<b>Last Name</b>	<b>Type</b>	<b>Intervenor</b>	<b>Hourly Fee Requested</b>	<b>Year Hourly Fee Requested</b>	<b>Hourly Fee Adopted</b>
Robert	Finkelstein	1	TURN	280	2000	280
Matthew	Freeman	1	TURN	190	2000	180
William	Marcus	2	TURN	150	2000	150
Jeff	Nahigian	2	TURN	95	2000	95